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17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF NEW YORK
19 -----x20 INTERNATIONAL BUSINESS
21 MACHINES CORPORATION,

22 Plaintiff,

23 v. 24 20 Civ. 4573 (PMH)

25 RODRIGO KEDE DE FREITAS LIMA,

7 Oral Argument

8 Defendant.

9 -----x
10 New York, N.Y.
11 June 19, 2020
12 11:00 a.m.

13 Before:

14 HON. PHILIP M. HALPERN,

15 District Judge

16 APPEARANCES

17 PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

18 Attorneys for Plaintiff

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-and-

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23 BY: ROBERT NEIL HOLTZMAN

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1 (The Court and all parties present telephonically)

2 THE COURT: Good morning, everybody. I see I've
3 attracted a crowd.

4 All right. I have -- and we'll get into it a little
5 bit more in a moment -- I have received, I believe, all of the
6 papers that were filed yesterday afternoon. I've endeavored to
7 review them and have a reasonable sense of what's going on
8 here. I want to give counsel the opportunity to tell me what
9 it is they want me to hear. I'm a burden of proof person. I'm
10 familiar with this area of the world, and I'm familiar with the
11 burden of proof associated with a temporary restraining order
12 and preliminary injunction under Rule 65 of the Federal Rules
13 of Civil Procedure. So I don't need you to remind me of that
14 as much as I'm interested in hearing -- Mr. Atkins, we'll start
15 with you -- what it is you want to emphasize during this
16 argument for a temporary restraining order.

17 MR. ATKINS: Thank you, your Honor. Shall I proceed?

18 THE COURT: Please.

19 MR. ATKINS: Thank you.

20 If it may please the Court, this is Robert Atkins. I
21 represent the plaintiff IBM. Let me just say at the outset,
22 and I believe I speak for everyone on both sides of the aisle
23 here, that we're very grateful for your Honor making the time
24 under the extraordinary circumstances, by which I refer to
25 COVID-19.

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1 So we're here today on our application for a TRO to
2 preserve the status quo and enjoin Mr. Lima from commencing and
3 announcing his employment at Microsoft as the corporate VP of
4 Latin America, and we seek to preserve the status quo,
5 obviously, until your Honor has a chance to decide the
6 preliminary injunction after taking some expedited discovery.

7 As you've seen, it's our belief that Mr. Lima, by
8 accepting that particular employment at this particular
9 competitor, has violated his noncompete agreement which he
10 signed several times but most recently in December of 2019,
11 which prevents him from taking a competitive position that
12 would or could result in him intentionally or unintentionally
13 using, disclosing, or relying on IBM trade secrets.

14 Let me start, and I promise to move briskly. Who is
15 Mr. Lima? Well, he was until May 18 one of IBM's most
16 high-ranking senior executives. He was part of the 1 percent.
17 He was a Band A executive which means his compensation rank
18 surpassed only by the chairman and CEO and her successor. He
19 is, as a result, steeped in IBM confidential information and
20 trade secrets. I'll get into some of them in a moment, but he
21 is by virtue of his various leadership and executive roles
22 aware of IBM strategies to compete against Microsoft. He's
23 aware of products, innovations, and priorities. He's very
24 aware of the company's client targets and strategies for
25 winning those clients head to head against Microsoft, and of

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1 course, he's very familiar with the most sensitive information
2 perhaps, which is the company's pricing forecasts of 2020
3 revenue and profit and margins and the like.

4 How is it that he came to be possessed and had access
5 to all those trade secrets and more? Well, he, first of all,
6 had numerous strategic corporate roles and responsibilities,
7 which means he literally and certainly figuratively sat next to
8 the chairman and CEO. For example, he attended and more the
9 most recent board of directors annual strategy meeting. Each
10 year there is one board meeting that is devoted to strategy.
11 Mr. Lima not only was in attendance and an observer, but he
12 participated in a presentation, part of which was the strategic
13 plan of attack and was present for discoveries regarding plans
14 for "countering Microsoft." That's his board role.

15 He also was a member of what IBM refers to as the
16 performance team. That, again, is a role next to the chair and
17 CEO. It is comprised of the top 60 executives, which is quite
18 a leap in a company of hundreds of thousands of employees. The
19 performance team directs the operations of the company. That's
20 worldwide, which, of course, includes Latin America. It's all
21 products, all product lines, all clients, all industries in all
22 regions. Just by way of example, at the most recent
23 performance team meeting in 2020, there were discussions of
24 cloud strategy. I am going to -- unless your Honor wants me to
25 go into depth about cloud, I think everyone recognizes that

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1 cloud computing is the number one battleground or maybe the air
2 war among IT companies like IBM and Microsoft. So at the
3 performance team meeting earlier this very year, there were
4 discussions of cloud strategy, new cloud offerings, corporate
5 priorities, and where and how and with what products to beat
6 the competition and, of course, specifically Microsoft.

7 His day jobs were as follows: In 2019, he ran the
8 entire global technology services business in North America,
9 again, in direct competition with Microsoft, with a focus, of
10 course, or an involvement of cloud.

11 In 2020, this year, before he announced his
12 resignation in May, he was the head of an entire business unit,
13 the responsibility of which was overseeing IBM's largest, most
14 strategically important and most valuable customers, amounting
15 to 77. And, obviously, as we've set forth, that includes many
16 clients and customers in Latin America. And in that role, he
17 had responsibility for implementing IBM's competitive strategy,
18 a strategy that was devised and applied worldwide and, of
19 course, again in Latin America, and again involving all
20 products in all industries that IBM offers.

21 In his own words in the declaration he submitted your
22 Honor yesterday, he described his role as "overseeing the top
23 clients and the financial performance of those relationships
24 that are most important to IBM," and all of those activities
25 and all of these clients were devised to beat Microsoft, among

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1 other competitors. And specifically in his own words and the
2 evidence your Honor will see, he said of Microsoft that they
3 are competing in 100 percent of IBM's clients, and that was his
4 responsibility before he departed.

5 Another example which goes more closely to the issue
6 of secrets, Mr. Lima said in his 2020 business plan for
7 overseeing all these important clients that "we need to take
8 Azure" -- that's the Microsoft cloud -- "we need to take Azure
9 by surprise and by speed." "Surprise," obviously, meaning
10 referring to strategies and products and directions that are a
11 secret to Microsoft and thus a surprise.

12 So what is the confidential information that Mr. Lima
13 knows, has access to, and was privy to as a result of all these
14 senior leadership positions? There are several. I'll go
15 through just a couple, your Honor.

16 Number one, as I mentioned, he was -- he participated
17 in and was aware of meetings and discussions and received
18 documents concerning IBM's global corporate strategy, including
19 the strategy to combat and, where possible, defeat Microsoft,
20 again, on a worldwide basis, which naturally includes Latin
21 America and, again, with respect to the most important turf in
22 the competitive war with Microsoft cloud. That's number one.

23 Number two, he is aware of and was privy to and part
24 of discussions regarding products and development, product
25 innovations, product priorities to beat the competitions,

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1 again, to surprise, in his words, the competition. That
2 includes, as we have identified, your Honor, because it is in
3 part public but not entirely, a first of its kind cloud
4 designed specifically for financial service businesses. We
5 will get into that when we proceed to the preliminary
6 injunction, but just to give your Honor a sense of what we're
7 talking about, we're talking about access to a cloud designed
8 specifically to protect the privacy and security of the type of
9 data that financial service companies, investment firms,
10 insurance firms, and banks possess on behalf of their
11 customers. Data security, data privacy, has been a huge
12 challenge in cloud computing, and IBM has a breakthrough.
13 Again, in Mr. Lima's own words, in his own strategic documents,
14 he referred to financial services as "a priority in the cloud
15 battle." That's number two.

16 Number three, he had access to and was aware of the
17 strategy and usages of IBM's largest acquisition in its
18 history, that's what we have referred your Honor to as Red Hat,
19 which is an open source cloud platform, and that acquisition
20 was made specifically to compete against Microsoft and the two
21 or three other major cloud competitors. How that acquisition
22 is going to be used, what type of products will unfold, and the
23 strategy for targeting clients with that new acquisition is
24 part of the surprise that IBM intends to use to compete in
25 cloud against Microsoft. That's number three.

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1 Number four, client targets in head-to-head
2 competition with Microsoft. And just to give your Honor
3 context, when we talk about client targets and head-to-head
4 competition, the largest battleground in terms of clients is
5 winning large enterprise businesses in large, long-term service
6 and product contracts, which are often or most often awarded
7 after RSP proceedings and enormous effort, and that is where
8 Microsoft and IBM butt heads with the world's biggest
9 companies, again, worldwide, in LA -- sorry, Latin America,
10 industry by industry, client by client. That was his
11 responsibility but a month ago and for the balance or the first
12 half of 2020. That's number four.

13 Number five, he's aware of and had access to what may
14 be the most sensitive information, IBM's forecasts for 2020 of
15 its client signings, its revenues, its profits, its margins,
16 and its pricing. So what is it that he intends to do? He
17 intends to go into direct competition against IBM for one of
18 IBM's fiercest rivals, Microsoft, which is in clear violation
19 of his noncompete agreement so long as he doesn't wait for 12
20 months, as he agreed he would and as he agreed would cause IBM
21 irreparable harm if he did not, in fact, honor his obligation
22 to wait 12 months.

23 The position he has accepted is the corporate vice
24 president for Latin America. In other words, he is the CEO of
25 Microsoft in Latin America. And here, I'm using words of the

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1 job description that Microsoft has provided to IBM, and bear in
2 mind, at this point this is all we know about his new job
3 because he haven't had a chance to take discovery. But what we
4 know from Microsoft is the following: As the de facto CEO of
5 Microsoft in Latin America, he will "be responsible for overall
6 strategy and direction of Microsoft in that region." He will
7 oversee all aspects of competition -- naturally, competition
8 against IBM -- involved in all operations, all functions, all
9 products, and all client battles. His mandate, again,
10 according to Microsoft is to set direction to implement
11 Microsoft "global strategy." He is to ensure in Latin America
12 that he is running Latin America in a "one Microsoft fashion."
13 So he is going to be privy to and be duty bound to implement
14 Microsoft's global strategy.

15 Well, that's exactly what he knows from his senior
16 leadership roles at IBM. He knows IBM's global strategy. He
17 knows IBM's one company global plans, plans to compete against
18 Microsoft, plans to compete worldwide, which, again, obviously
19 include Latin America. So he is going from a global corporate
20 role to a Latin America corporate role. Obviously, Latin
21 America is part of the globe. So there is a complete overlap
22 in job responsibilities, or put another way, Latin America is
23 fully covered by his prior role.

24 Your Honor, we submit that under the governing law for
25 noncompetes in New York State, he should be enjoined. He

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1 certainly should be enjoined until such time, quickly,
2 expeditiously the Court has a chance to rule. And that's not
3 merely because it is a breach of his agreement, though it is,
4 it is because of the real and irreparable risk of what we all
5 know as inevitable disclosure. It just so happens that one of
6 the leading cases, at least in this district, is an IBM case
7 involving the IBM noncompete decided by this very court, and
8 that is the case of *IBM v. Papermaster* decided by Judge Karas.

9 THE COURT: I read it.

10 MR. ATKINS: You read it.

11 THE COURT: Yes. I also read *Visentin and Johnson*.

12 So I get it. I got it.

13 MR. ATKINS: So I think in this case, on these facts,
14 at this time, it is, to quote Judge Karas, likely that Mr. Lima
15 will inevitably draw upon what he knows from IBM whether or not
16 that's intentional or in bad faith. Among other things, like
17 Mr. Papermaster, Mr. Lima knows strategic plans, product and
18 development and long-term business opportunities. So, as your
19 Honor can see and obviously decide for yourself, at this point
20 it is a question of whether there is a risk, whether it is
21 likely that there is a risk of inevitable disclosure given his
22 positions at IBM, his knowledge from within IBM, and where he's
23 going at Microsoft.

24 I might just point out by way of illustration how this
25 might manifest itself. I found it interesting that in his

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1 declaration in opposition to the motion, or the TRO
2 application, he says in paragraph 20, and I quote: "It is
3 dubious that IBM is a serious competitor to Microsoft with
4 respect to public cloud computing." Now, how are we to suppose
5 that he knows or thinks that? How is IBM to have confidence
6 that it is not based on what he learned and what he knows from
7 inside IBM? That's kind of a crystallization, an example of
8 inevitable disclosure. He cannot help himself given the type
9 of knowledge, secret knowledge, he brings with him from IBM.
10 And absent enforcement of the agreement, that is the very risk
11 that IBM faces and that IBM is entitled to be protected
12 against. After all, that is what Mr. Lima agreed to.

13 So why is it that we need a TRO? Obviously, to
14 preserve the status quo. The parties had a standstill that
15 expired yesterday. Mr. Lima would not consent, though we
16 asked, to a temporary restraining order pending your decision
17 on the preliminary injunction. He has referred to the fact
18 that Microsoft appears to have agreed that he will not start
19 until July 15. That, I suppose, is a partial restraining
20 order, but it's not sufficient because at least they have not
21 said and have yet to commit to him doing nothing with respect
22 to Microsoft, not engaging and not associating with Microsoft
23 in the words of the noncompete agreement. We have in other
24 cases become familiar with what often happens in these
25 situations where even if "employment doesn't start" or the new

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1 employee doesn't go on the payroll, they begin communications
2 with folks on the inside. They get briefings, they attend
3 meetings, or they listen to meetings. They review documents.
4 They receive orientation. That we need to be protected against
5 as well to ensure that the status quo is, in fact, preserved
6 until your Honor has a chance to rule.

7 Likewise, he and Microsoft are threatening to jump the
8 gun and announce his employment. We were told they might do it
9 as early as today. They were good enough to refrain from doing
10 so at least until this hearing. We submit they should be
11 required to refrain until there's a ruling and not, in effect,
12 usurp your Honor's role to decide this issue, but rather, your
13 Honor should preserve the status quo by enjoining him from
14 starting, associating, or announcing his employment. I would
15 say that there's nothing that I have seen that the parties,
16 particularly Mr. Lima, cannot wait the short time until the
17 preliminary injunction, our motion, is decided. As I
18 mentioned, he's already willing to wait at least to some extent
19 until mid-July. There's surely no reason that we cannot be
20 done with this exercise by end of July, of course, subject to
21 your Honor's schedule and timing. We've done this many times
22 before, and I am confident that the parties, working together,
23 can be efficient and reasonable and collegial and get this done
24 by the end of July. I have no reason to believe and have seen
25 no evidence from Mr. Lima that he's in any financial extreme,

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1 at least for the next month. He was a highly compensated
2 executive with salary and bonuses in the neighborhood of a
3 million. He's leaving, even after forfeiture, with equity
4 worth at least \$3 million, so there's no reason to believe that
5 another month will put him in any jeopardy.

6 So, your Honor, for all those reasons, we respectfully
7 submit that the status quo be preserved, the parties have an
8 opportunity to take discovery, and your Honor have an
9 opportunity to rule on the preliminary injunction motion.

10 THE COURT: Mr. Atkins, thank you. I very much
11 appreciate your clarity.

12 Mr. McQuade, I'm happy to hear from you now.

13 MR. McQUADE: Yes. Good morning, your Honor. So I
14 will start with Mr. Atkins' final points because I think it
15 goes to one of our -- one of the crucial issues that's before
16 us today on this temporary restraining order, and that is the
17 issue of irreparable harm. Both Microsoft and Mr. Lima have
18 committed in writing to IBM that Mr. Lima will not start work
19 for Microsoft, will not commence employment with Microsoft,
20 before July 15. Their entire irreparable harm argument is
21 based on the fact that he's going to start employment, and they
22 believe that there's a chance that he could use or disclose IBM
23 information. Given that he's not going to start until July 15,
24 their entire irreparable harm argument collapses. There's just
25 no -- there is no irreparable harm absent the issuance of a

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1 temporary restraining order.

2 With respect to the job announcement or the
3 announcement that Mr. Lima will be starting work with
4 Microsoft, there is no basis for that type of restriction.
5 There's no basis for it in the noncompete agreement. IBM, in
6 fact, has already issued that statement essentially publicly by
7 commencing this lawsuit and taking -- and disclosing to the
8 world in their papers filed with the Court that Mr. Lima will
9 be commencing employment with Microsoft. So the cat's out of
10 the bag on that one. They can't ask Mr. Lima to put it back
11 in. They're not entitled to that under the agreement, and I
12 think any restraint on Mr. Lima's ability to make such a
13 statement would impinge upon his First Amendment rights.

14 I don't even know how that would work. I mean, if he
15 received a telephone call from a relative and he disclosed
16 what's going on in his life, that he accepted a position, he's
17 been named as a defendant in a lawsuit, that would be put him
18 at risk of violating a court order. That can't be the case.
19 With respect to Microsoft's announcement, Microsoft is not a
20 party to this litigation, so there's no basis for restricting
21 Microsoft in making any type of announcement that it deems
22 necessary.

23 So with what, your Honor, we really don't see a basis
24 for a temporary restraining order. We committed to not having
25 him commence work until July 15, and as Mr. Atkins said, we've

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1 done this before. We see no reason why we couldn't conduct the
2 discovery that we need to conduct and be in a position to have
3 this ultimate issue resolved in the injunction hearing.

4 THE COURT: OK.

5 MR. McQUADE: Your Honor, I'd also like to respond to
6 some of the other points --

7 THE COURT: Sure.

8 MR. McQUADE: -- the confidential information and the
9 other protectable -- alleged protectable interests under the
10 noncompete agreement.

11 With respect to -- there's a couple things that
12 Mr. Atkins did now point out, and that is in addition to IBM --
13 Microsoft's pledge to IBM that it would not start Mr. Lima
14 working with Microsoft until July 15, Microsoft also pledged
15 that it would wall Mr. Lima off from working on any of those
16 enterprise accounts, those top 77 accounts, for a period of one
17 year. So he'd be entirely walled off from those. He'd also be
18 entirely walled off from any customers that he worked with as
19 part of the partnership executive program. So that takes
20 the -- that entirely takes the customer overlap issue out of
21 the case. He's not going to be working with any of the same
22 customers during the first year of his employment with
23 Microsoft.

24 With respect to a number of the other alleged
25 confidential information that he was privy to, it's our

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1 position that the description of that information is
2 exaggerated, and as pointed out in Mr. Lima's affidavit --
3 declaration, it's our position that the affidavit submitted by
4 Mr. Walker is not based on firsthand information. And your
5 Honor, I could refer you to page 15 of our memo of. Law, we go
6 through each of the alleged categories of confidential
7 information that Mr. Lima was allegedly subject and privy to
8 during his employment at IBM. We go through them point by
9 point, and Mr. Lima, in his declaration and as laid out in the
10 brief, we explain why there's no valid basis for the
11 allegations.

12 Your Honor, I'm glad to hear that you were able to
13 review the *Visentin* case. I think that case is instructive and
14 it is -- it provides an example that's very similar to this
15 case. It's a case that was where the Court granted the
16 preliminary injunction, and it was affirmed by the Second
17 Circuit.

18 Your Honor, also with respect to the inevitable
19 disclosure argument, as cited in our papers, the inevitable
20 disclosure doctrine is disfavored here in New York. There was
21 a -- there are a number of cases cited in the brief where the
22 court has refused to apply the inevitable disclosure doctrine
23 and has pointed out that that doctrine is disfavored by New
24 York courts, particularly the *Marietta* decision cited in our
25 papers.

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1 Finally, your Honor, with respect to the harm to
2 Mr. Lima, there will be harm to Mr. Lima if he is required to
3 sit out for the -- for a temporary restraining order period,
4 and that is also laid out in our brief. This is an individual
5 who has spent his whole life in this field, and it would be
6 inappropriate and unfair for him to have to sit out for any
7 period of time.

8 MR. DELIKAT: Your Honor, it's Mike Delikat also for
9 the defendant. If I could just make a very brief comment, if
10 that would be permitted?

11 THE COURT: I want to make sure -- Mr. Delikat, I will
12 hear from you. Let me make sure Mr. McQuade -- as we all know
13 and realize, we're talking to each other on the telephone, so I
14 can't see any of you, and I can't tell whether Mr. McQuade or
15 done or is taking a carefully planned breath to continue to
16 think what else he wants to say to me.

17 So if you're done, Mr. McQuade, terrific. If you're
18 not, I don't want to cut you off.

19 MR. MCQUADE: Yeah, thank you, your Honor. Michael
20 Delikat is with Orrick and on the papers on the case, so happy
21 to have him jump in.

22 THE COURT: OK. Mr. Delikat, it's all yours.

23 MR. DELIKAT: Good morning, your Honor, and thank you
24 for hearing us today and for allowing me to add a few points.

25 We also very much believe, as you do, that burden of

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1 proof is important and a temporary restraining order is an
2 extraordinary remedy that can only be issued -- we all know
3 what those conditions are, and that burden has clearly not been
4 met in this particular case.

5 I just want to respond to a couple of the other major
6 points that Mr. Atkins made about trade secret information that
7 IBM claims will be inevitably disclosed. First of all, there's
8 never been a case under inevitable disclosure where -- even
9 outside this circuit, where that doctrine has been applied
10 unless there was a reason to believe that the departing
11 employee was untrustworthy or was a bad leaver or had done
12 something wrong, and there is absolutely no evidence of that in
13 this particular case. So I think inevitable disclosure can be
14 taken off the table as it's been applied in any circuit.

15 They also make a really big point about competition in
16 the cloud. We've been on many of these cases where Paul Weiss
17 is on the other side where cloud has been an issue for IBM
18 seeking to enforce these noncompetes, which it frequently does,
19 and as the Second Circuit said in *Visentin*, they use it not for
20 protectable interests but as a way of discouraging highly
21 qualified employees from leaving and improving their careers
22 and trying to do better in a situation. And even here IBM has
23 already said in their papers publicly that Mr. Lima's
24 performance was no longer top notch, as far as they were
25 concerned.

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1 With respect to any competitively sensitive
2 information that he has, he is also subject to an entirely
3 separate obligation of confidentiality of nondisclosure which
4 continues indefinitely, and they have a remedy if there is any
5 breach of that. He said he has no intention and he has
6 reaffirmed his obligation to keep any information confidential.

7 With respect to some of the big items that Mr. Atkins
8 talks about, the cloud, everybody in the technology space knows
9 that IBM is not at the same level of a competitor in the cloud
10 space as is Microsoft, Oracle, and Amazon. Those are the three
11 big players. IBM has for many years sought to effectively
12 compete in that space and, at least at the level that the three
13 big players compete in it, have been totally unsuccessful.
14 That's why they acquired Red Hat, because they couldn't make a
15 go of it. Everybody knows what Red Hat does. This was a
16 public acquisition. Mr. Lima had no involvement in the
17 strategic decision to acquire Red Hat or its integration or
18 anything like that. He knows nothing more than what the public
19 would know and what IBM has said publicly about its plans, why
20 it acquired Red Hat, to improve its position in the cloud
21 market. So they do not compete at level.

22 This attention to these 77 customers, clients, that
23 Mr. Lima had overall responsibility for, well, he took that job
24 on, your Honor, in January of this year. As we all know, the
25 terrible tragedy of COVID beset us shortly after that. He did

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1 not meet or interact or travel. He's been doing what we've all
2 been doing in terms of sheltering in place, and so it's not
3 like he's worked with these 77 clients for the last six years.
4 He's been in a variety of different jobs. His stint in South
5 America was three to four years ago. We all know how rapidly
6 the market in technology and the technology itself changes. So
7 anything he knew about what was happening then is totally
8 irrelevant today.

9 So there's a lot of smoke and mirrors in their "he
10 possesses most confidential information and somehow he
11 inevitably has to use that." He doesn't. And, you know, he's
12 not sitting at the arm of the chairman at Microsoft. He has
13 overall responsibility for the business in South America. He's
14 from South America. He's comfortable in that space. He can
15 put his skills, both language and understanding the culture and
16 markets down there, to use, but he hasn't done that work for
17 IBM for over three years. And he has, as Microsoft has
18 promised, as Mr. McQuade said, to wall him off from any
19 dealings with clients that he had dealings with while he was at
20 IBM. And then, on top of that, he has the independent
21 obligation on nondisclosure and confidentiality and
22 nonsolicitation of IBM employees going forward.

23 So what this case is about is an effort only to
24 enforce a noncompete, to send a message to every senior
25 executive at IBM, as they do when they -- as they filed dozens

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1 of this lawsuit, that if you leave, we will go after you. We
2 will clawback your equity that we've given you, and we will
3 also seek to restrain you from working and sitting you on the
4 bench for a year in an industry, such as technology, that is
5 moving so rapidly so that by the time they get back into the
6 market, they're already a year behind all the changes that have
7 occurred. It's a retention tool, and as the Second Circuit
8 recognized in *Visentin* that is not appropriate. They've also
9 sued in this case for a recovery of his equity, to capture that
10 money back, and so they have a remedy that is not an equitable
11 remedy that is in compensation that they are attempting to
12 recover, and wherever the chips fall on that in the litigation,
13 the chips will fall in terms of whether he has to give that
14 back or doesn't have to give that back.

15 THE COURT: I understand.

16 MR. DELIKAT: So for all of those reasons, we think,
17 again, they have not met their burden for the extraordinary
18 relief of a temporary restraining order.

19 THE COURT: Thank you, Mr. Delikat.

20 Mr. Atkins, I'm sure you're anxious to reply, but I
21 don't really need a reply. I really don't. I've heard enough.
22 I understand where I am.

23 I first want to say, because you all know I'm new, I'm
24 the new judge, how much I appreciate counsel's presentations.
25 It's a pleasure to listen to lawyers like you who actually come

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1 forward with the relevant information and politely attempt to
2 steer the judge in the right direction, and I have to say how
3 much I enjoy listening to competent lawyers explain to me what
4 they want me to hear. So thank you for putting in the time and
5 effort, and I hope some of the young lawyers who are listening
6 recognize that you're listening to lawyers who are highly
7 qualified and, as far as I'm concerned, very competent. So
8 thank you for that.

9 I want to be clear as to what's going on here, and so
10 I'm going to make a record of what I perceive to be going on.
11 And I will have a couple of questions, but I will get to my
12 ruling pretty quickly.

13 This is an application for a preliminary injunction
14 and temporary restraining order that was filed yesterday
15 afternoon at 2 p.m. The plaintiff filed an affidavit of a
16 Randy Walker, a global managing director of IBM; affidavit of
17 Mr. Signoracci, counsel at Paul Weiss; a memorandum of law; and
18 also pointed out to me a Microsoft case called *Matthews v.*
19 *Miszewski*.

20 Plaintiff -- I'm sorry, the defendant filed the
21 affidavit of the defendant, the affidavit of an assistant
22 general counsel Ann Pannoni, as well as a memorandum of law,
23 all of which I've endeavored to read and understand.

24 This action was commenced on June 15 by the plaintiff,
25 IBM, to enforce a noncompete agreement entered into between the

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1 plaintiff and the defendant on December 3, 2019. The
2 affidavits reflect that this December 3 version of the
3 agreement is the most recent version of an agreement signed by
4 the defendant over the years.

5 On May 18, the defendant informed the plaintiff that
6 he intended to join Microsoft as a corporate vice president for
7 Latin America. The defendant was employed by the plaintiff for
8 approximately 24 years. From May 18 until now, the parties and
9 their counsel have been in regular communication, entering into
10 standstill agreements of limited duration. Counsel for
11 Microsoft submitted an affidavit indicating that the defendant
12 will not begin employment until July 15, 2020, and that
13 defendants will have no involvement with Microsoft's business
14 relations concerning customers that were IBM integrated
15 accounts or that the defendant worked with previously.

16 On June 5, the defendant formally accepted the job
17 from Microsoft. The plaintiff's complaint includes three
18 claims for relief. The first claim for relief is a breach of
19 contract, noncompete seeking both money damages and preliminary
20 and permanent injunctive relief. The second claim for relief
21 is a misappropriation of trade secrets. And the third is a
22 declaratory judgment seeking declaration of the
23 plaintiff's right to rescind an equity award and to demand
24 repayment.

25 Let me just interrupt myself and say, Madam Court

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1 Reporter, are you OK?

2 (Discussion off the record)

3 THE COURT: The noncompete agreement itself contains a
4 number of very straightforward and clearly written provisions
5 which the Court will consider in determining this application.

6 Paragraph 2(e) relates to the protection of "IBM
7 confidential information" and the nonsolicitation of customers.
8 Paragraph 2(f) relates to the nonsolicitation of employees.
9 Paragraph 3(f) creates a number of acknowledgements which the
10 Court will consider in connection with this application for a
11 temporary restraining order, as well as paragraph 4 which again
12 addresses irreparable injury and injunctive relief.

13 Counsel for both sides have addressed themselves to
14 the burden of proof for a temporary restraining order. The
15 plaintiff has suggested that a case similar, *IBM v.*
16 *Papermaster*, 2008 WL 497508, a Southern District 2008 case,
17 where Judge Karas issued an injunction enforcing a similar
18 noncompete is what carries the day. The plaintiff also has
19 pointed out that *Microsoft v. Miszewski*, that Microsoft itself
20 enforces its own noncompetes in court and cites that decision
21 from the Superior Court in Washington State for the proposition
22 that Microsoft as well enforces.

23 Defendant has suggested that this case is covered by
24 *IBM v. Johnson*, 629 F.Supp.2d 321, a Southern District 2009
25 decision which was affirmed at 355 F.App'x -- and I don't have

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1 the page, but it's a Second Circuit decision. We'll supply
2 that page -- as well as *IBM v. Visentin*, 2011 WL 672025, a
3 Southern District 2011 case which was affirmed at 437 F.App'x
4 53 from 2011 where plaintiff's request for injunctive relief
5 was denied. Mr. Visentin was a general manager at IBM leaving
6 for Dell, and Mr. Johnson was a VP of corporate development
7 leaving for HP. In *Visentin*, Judge Seibel issued a temporary
8 restraining order and scheduled a preliminary injunction
9 hearing. In *Johnson*, Judge Karas issued a TRO but permitted
10 the defendant there to commence work. There was an issue in
11 that case, *Johnson*, initially about whether Mr. *Johnson*
12 executed the agreement at issue. He apparently signed under
13 the IBM block to give him a -- signature block, to give himself
14 a chance to think more about whether he agreed with the
15 noncompete. In *Papermaster*, Judge Karas also issued a TRO,
16 albeit after return date of the order to show cause because
17 apparently plaintiff there did not learn that Mr. *Papermaster*
18 had started working at Apple until then.

19 The burden of proof on an application for temporary
20 restraining order is clear, and frankly, both sides agree. In
21 order to sustain the proposition, there needs to be a
22 likelihood of success or sufficiently serious questions going
23 to the merits to make them fair grounds for litigation,
24 irreparable injury, and a balancing of the hardships in favor
25 of the movant.

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1 From what I see, there are sufficiently serious
2 questions going to the merits to make them fair grounds for
3 litigation. It is clear to me that IBM and Microsoft are
4 competitors. A valid agreement was signed by sophisticated
5 individuals with counsel available. The restrictions as to
6 time and geography appear reasonable to me, and defendant
7 himself agreed with that conclusion in paragraph 3 of the
8 agreement. The defendant and his new employer have
9 acknowledged that they will not have any involvement with
10 customers that were IBM integrated accounts or customers that
11 the defendant worked with concerning his partnership executive
12 program for 12 months from May of this year. I construe that
13 as agreeing to the provisions of paragraph 2(e)(ii).

14 I also find that the defendant agreed to an injunction
15 should we find ourselves -- he find himself in this situation.
16 He said and agreed that -- and this is from paragraph 4 -- you
17 agree that the company would suffer irreparable harm if you
18 were to breach or threaten to breach any provision of this
19 agreement and that the company would by reason of such breach
20 or threatened breach be entitled to injunctive relief in a
21 court of appropriate jurisdiction without the need to post a
22 bond, and you further consent and stipulate to the entry of
23 such injunctive relief in such a court prohibiting you from
24 breaching or further breaching this agreement.

25 With respect to the confidential information covenant,

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1 paragraph 2(e)(i), the defendant acknowledged in his agreement
2 the difficulty of understanding whether this agreement would be
3 breached. He said: You acknowledge that a mere agreement not
4 to disclose, use, or rely on confidential information after
5 employment by IBM ends would be inadequate standing alone to
6 protect IBM's legitimate business interests. You acknowledge
7 that disclosure of, use of, or reliance on IBM confidential
8 information, whether or not intentional, is often difficult or
9 impossible for the company to detect until it's too late to
10 obtain any effective remedy. You acknowledge that the company
11 will suffer irreparable harm if you fail to comply with
12 paragraph 1 or otherwise improperly disclose, use, or rely on
13 IBM confidential information.

14 Defendant has offered to make his commitment date
15 July 15, 2020, which I take as an effort to comply with
16 paragraph 2(e)(i). It appears to me on the papers that the
17 defendant has confidential -- IBM confidential information as
18 defined in this agreement worthy of protection, and I'm
19 applying the definition of the agreement set forth in
20 paragraph 2(e). Just to give a feel for what I see, there is
21 confidential information in top client accounts and strategies,
22 acquisition strategies, including the deployment of this Red
23 Hat pricing strategies, competitive strategies. There's
24 argument this morning that even at board meetings the defendant
25 revealed plans for competing with Microsoft. He's on the

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1 performance team. He's a Band A executive in the top 1 percent
2 at IBM. He runs a global portfolio for IBM's top 77 clients.
3 He's exposed to software, hardware, cloud computing, AI, IBM's
4 financial services ready public cloud, a new product. There
5 are serious questions here which need to be adjudicated at a
6 hearing after discovery.

7 With respect to irreparable injury, as I previously
8 indicated, the defendant has acknowledged it both in
9 paragraph 3 and paragraph 4 of the agreement he signed. The
10 risk of exploiting customer relations, goodwill, etc., as I've
11 indicated is irreparable injury. That's *Ticor Title v. Cohen*,
12 173 F.3d 63, 69 (2d Cir. 1999).

13 With respect to the balance of the equities, as of
14 now, as of now, I believe the balance of equities favors the
15 plaintiff's legitimate interest in protecting their
16 contractually paid for rights. The defendant, of course, has
17 an interest in continuing his career, but he agreed to these
18 restrictions, he was well paid for them, and he has
19 acknowledged his willingness to abide by them, albeit not
20 through May of 2021. So far the defendant has indicated that
21 he has a financial hardship in a general way, in a way that I
22 can't adjudicate presently without any proof. So, for all of
23 those reasons, I'm going to grant a limited temporary
24 restraining order.

25 Now, let me stop for a second. I have not heard a

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1 word about and the papers do not reflect anything about
2 contacting current employees and leaving -- and soliciting
3 employees from leaving IBM, so I'm not going to consider in the
4 TRO that branch. That's the first thing.

5 The second thing is I agree with counsel for the
6 defendant, both Mr. Delikat and Mr. McQuade, that I have no
7 business enjoining a nonparty or this party from announcing any
8 prospective employment. I'm not going to do that. I am going
9 to enjoin the defendant working and providing services, for
10 that would be in violation of this agreement. For example,
11 rudimentary, if the answer to the temporary restraining order
12 was perhaps Microsoft would put him in a ministerial role, I
13 don't know what it would be. I don't believe that IBM
14 bargained for that protection. On the other hand, any
15 alternative position that would run the risk that IBM bargained
16 for would be inappropriate.

17 Now, I also did not hear, and I believe it's because
18 the parties to this litigation agree, that there would be no
19 bond required under Rule 65. Am I correct about that, counsel?

20 MR. ATKINS: Yes, your Honor.

21 THE COURT: So I'm going to modify the temporary
22 restraining order, and I want to emphasize something. I want
23 to be clear about something. I'm crystal clear that what's
24 right here today is what I'm doing. Obviously, that's what I
25 think. I am interested in giving the parties an opportunity to

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1 complete expedited discovery and to actually come to my
2 courtroom where we'll be able to have a hearing in July. I
3 have an interest in getting to the bottom of this and
4 understanding whether this is a case that a preliminary
5 injunction is appropriate, and I believe when we sharpen our
6 pens a little bit and get some of this discovery done, it will
7 become clearer as to whether or not this temporary restraining
8 order turns into some kind of a preliminary injunction. But
9 for now, that's my ruling.

10 Now, I need to understand how long it will take for
11 the parties to complete preliminary injunction discovery. I
12 heard both of you say there's collegiality here and mutual
13 respect. I appreciate that. There shouldn't be any fights
14 here about what we need to get done. But how long do you need
15 to complete discovery in order to be ready for a hearing before
16 me on preliminary injunction?

17 MR. ATKINS: Your Honor, given the July 4th in there
18 and all, I'm confident -- I'll come from the other end. I am
19 confident we could have a hearing the week of July 20.

20 THE COURT: Who's speaking? Is that Mr. Atkins?

21 MR. ATKINS: I was speaking.

22 THE COURT: OK. You need to identify yourself for the
23 reporter because she can't see you either.

24 MR. ATKINS: I apologize. It's Robert Atkins, counsel
25 for IBM. And what I was saying was I was comfortable that we

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1 would be able to have a hearing the week of the 20th, of
2 course, if your Honor is available.

3 MR. DELIKAT: Your Honor, this is Mike Delikat for the
4 defendant. As you know, there was an agreement here that
5 Mr. Lima would not start before July 15. And we very much
6 appreciate the challenges to the system that are being caused
7 by COVID-19; however, the rules for a TRO in 65 are pretty
8 clear that they cannot exceed -- a TRO cannot exceed ten days
9 unless there is consent by the parties or good cause shown. We
10 can supply the authority on this, but we think the authority is
11 clear that good cause would not be shown here to extend the TRO
12 beyond the ten-day period without having the preliminary
13 injunction adjudicated.

14 We would be willing to advance that schedule so that
15 we could appear before your Honor at some point before July 15
16 so that your Honor -- and your Honor seems very capable to go
17 through a lot of material and make decisions quickly here --
18 could make a decision around the July 15 date. We're dealing
19 with two big law firms here that have a lot of people. We can
20 double track whatever depositions are necessary. It's not a
21 huge discovery case, by any means, given what the facts and
22 issues are in this case. So we would like a date to appear in
23 your court several days before that July 15 date to present the
24 evidence and the arguments on the preliminary injunction with
25 the intent that your Honor could rule very closely therein to

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1 that date. And under those circumstances, I think we would be
2 willing to consent to the extension, you know, of course
3 reserving all our rights.

4 THE COURT: First of all, you will preserve all of
5 your rights with me every time we entertain any application.
6 Rule 65(b)(2), which is what you're referring to, extends the
7 period for 14 days, not ten.

8 MR. DELIKAT: Fourteen, I'm sorry.

9 THE COURT: And extends it beyond that for good cause
10 shown. You're right to raise that issue. I've got a couple of
11 logistic issues that may or may not be good cause shown. We're
12 working our way out of the COVID period, and I am trying to get
13 the date on which you'll be able to enter the courtroom. I
14 have two options in connection with this hearing. One is to do
15 it in my courtroom. It's courtroom 12D. It's socially distant
16 and actually ready for civil juries. So there's plenty of room
17 for counsel and the witnesses and everything else. That would
18 be my preference. I want to look at and hear from, in front of
19 me, these witnesses. I want to meet them eyeball to eyeball
20 and take a look at and listen to them carefully. That would be
21 my preference.

22 The other option, of course, is we could attempt a
23 Skype or a Zoom preliminary injunction hearing. It is not out
24 of the question if you both insisted. It's not my preference,
25 frankly. It's not my preference. I want to see and meet

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1 Mr. Lima. I want to understand from the IBM individuals who
2 are going to appear and testify exactly what it is that they're
3 concerned about with Mr. Lima. I want to hear more, obviously.
4 So it would be my preference.

5 As to my ability to comprehend, I assure you that I am
6 endeavoring to do what's right, and I'm endeavoring -- you both
7 earnestly came to me and asked me to expedite. I did, and I am
8 always happy to help lawyers. I just don't know, Mr. Delikat,
9 that I can hear the testimony and rule before the 15th. I
10 would encourage, I would encourage, that you consider the
11 possibility so as to give the judge a reasonable opportunity to
12 rule. You know what I've ruled on now. You understand where I
13 am. You could try to enter into some kind of an understanding
14 that gives us a fair amount of time. Otherwise what we'll do
15 is we'll have a return date on the temporary restraining order
16 for 14 days from today, and you'll come back and tell me in 14
17 days why I should or should not extend it, and I will hear
18 argument with an open mind and determine what to do in 14 days.

19 If we need to do that, OK by me. You're entitled to
20 that. I'm trying to expedite for both parties a resolution
21 here. I've been in this problem approximately 22 hours, and
22 I've done my level best to call it as I see it in accordance
23 with the law and the burden of proof, subject to further proof.
24 So if you need to insist on the 14 days, we'll get a conference
25 date.

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1 Let me get my courtroom deputy. I don't know what it
2 is you want to do. Do you want to wait 14 days come back?

3 MR. DELIKAT: Your Honor, this is Mr. Delikat. Let me
4 respectfully suggest perhaps one other thing. I think
5 everything you said is eminently reasonable and fair,
6 especially under the circumstances, and we very much appreciate
7 how quickly you got deeply into the facts of this case since
8 the papers were filed yesterday.

9 Because we know your schedule will also be in demand,
10 might it be possible as part of this -- and I have no idea
11 what's on your schedule -- to set the hearing on the
12 preliminary injunction for July 13, which is a Monday, or some
13 period right around there, right around the 15th? We can, of
14 course, have the two-week capture date that you're speaking to,
15 the 14 days, but at least knowing, subject, of course, to your
16 Honor's schedule, that we're moving towards really an
17 expeditious preliminary injunction hearing and that gives the
18 parties, you know, three full weeks -- July 4 is a Saturday
19 this year -- but three full weeks with the exception of July 4
20 to do what they have to do with respect to discovery.

21 THE COURT: Let me ask you a question. I realize you
22 have a client who agreed to July 15, and I appreciate that and
23 I respect that. What I'm wondering is whether it would be
24 possible to, by agreement or not, extend that date a couple of
25 days. I have to go and get a firm commitment -- let me get my

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1 courtroom deputy.

2 Frank -- first of all, on the 13th or the 20th, are
3 both counsel available for a hearing?

4 MR. DELIKAT: Defendant is.

5 MR. ATKINS: Yes, your Honor.

6 THE COURT: Plaintiff?

7 MR. ATKINS: Yes, your Honor.

8 THE COURT: OK. Frank, could you please look and see
9 what we have. We're going to need probably -- these lawyers
10 are familiar with the Rules of Evidence -- probably a day or
11 two, maybe two days, for a hearing here to get to the bottom of
12 this. What about the 14th, Frank, two days?

13 We're just checking, counsel. Give me a chance here.

14 MR. ATKINS: Your Honor, it's Mr. Atkins. When the
15 moment is right, I'd just like to share my thoughts about this.

16 THE COURT: Of course.

17 MR. ATKINS: Would you like me to go ahead?

18 THE COURT: No, hold on a second. Let me do one thing
19 at a time.

20 MR. ATKINS: That's what I figured.

21 (Discussion off the record)

22 THE COURT: So, counsel, where I am is the public --
23 I'm actually here in the courthouse today where a lot of judges
24 actually are and have been for this entire period, trying to do
25 what's right. They're saying when the courthouse hits Phase 2,

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1 not New York City but the courthouse, the public will be
2 allowed back in, and we're allowed to have hearings and do
3 whatever we want. The current thinking is that will be the end
4 of the month of June, and so I will -- we'll have to get firmer
5 on that.

6 But before I set this date, Mr. Atkins, you have
7 politely been quiet, listening to Mr. Delikat on the issue of
8 14 days, etc. What would you like to say about that or
9 anything else?

10 MR. ATKINS: Thank you, your Honor.

11 I think because of the slowdown in work, the obstacles
12 created by COVID, notwithstanding the prospect of things
13 opening up slowly, it's been my experience in the last several
14 months that things that appear to take -- ordinarily would take
15 one week end up taking two weeks. In addition, we may well
16 have need of your services, let me put it that way, in terms of
17 discovery issues. For example, we're going to need discovery
18 from Microsoft. We need -- we're still waiting on access to
19 Mr. Lima's electronic devices which are in the hands of some
20 forensic vendor. If history teaches, these things take more
21 than a couple of days.

22 So it would be my recommendation and suggestion that
23 we just buy ourselves one other week and do it on the 20th. I
24 don't see any prejudice or harm to anyone. And I suppose I
25 would add, July 4 -- of course, Mr. Delikat and I have worked

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1 through holidays many times before, but I don't see the
2 necessity of doing that here. So taking into account all those
3 factors, having done this many times, I just think the 20th is
4 going to be a more reliable date to get this done and give your
5 Honor an opportunity to rule on a full record.

6 THE COURT: Frank, would you just look and see on our
7 calendar the 20th and the 21st, what we have on those days.

8 (Discussion off the record)

9 THE COURT: My courtroom deputy's pointing out to me
10 that on the 27th and 28th, I have two clear days. I want to
11 accommodate the lawyers and their needs as best I can. I don't
12 know whether it's even possible on the 20th or the 21st. So
13 let me just wait and get that. So if I issue a temporary
14 restraining order, today is the 19th, so there'd be ten days
15 plus four days, that would bring me to July 4. I guess that
16 would get me to Monday, the 6th, 14 days.

17 (Discussion off the record)

18 THE COURT: All right. I would say this: We're going
19 to block out two two-day periods primarily because (a) I want
20 to accommodate Mr. Delikat and his clients July 15, so we'll do
21 the 14th and the 15th. We're going to also block out, Frank,
22 the 20th and the 21st, mark both of those days out, and we'll
23 see the answer to which days are going to be -- from my end are
24 going to be COVID-related and public coming into the courthouse
25 related.

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1 Now, Mr. Atkins, you raise an interesting question
2 about the discovery. So on Monday, the 6th of July, Frank,
3 let's fit everybody in for a hearing on whether or not this
4 temporary restraining order should be extended another 14 days,
5 and that will get me to a hearing one way or the other,
6 hopefully. I'm going to need -- they're going to want to talk
7 at least an hour.

8 July 6 at 10:30. OK. So for the moment, I'm going to
9 make this motion returnable, I think, on the 14th, subject to
10 the Court adjourning it to the 20th for COVID reasons.

11 Now, on the discovery, what I may do is I may have you
12 talk to the magistrate. I have an enormous amount on my plate,
13 and I would prefer if we're going to get into the weeds and
14 bang and holler at each other, I prefer that the magistrate
15 hear all of that, and I can keep a clear mind about the merits
16 here for my hearing and not get dragged into the
17 plaintiff-against-defendant and defendant-against-plaintiff
18 issues. So I think what I'll do is I'll send you to the
19 magistrate for discovery issues on the preliminary injunction,
20 unless somebody has a serious objection to that.

21 MR. DELIKAT: Your Honor, it's Mr. Delikat. I think
22 that's a very sensible decision. Hopefully, we can work out
23 our discovery with Paul Weiss on this, but if not, we will go
24 to the magistrate. I assume we could do that by letter at that
25 point to resolve any disputes we have.

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1 THE COURT: I'm going to issue an order directing the
2 magistrate to hear the discovery issues, and then I don't know
3 who is the magistrate in this case. I don't have it in front
4 of me, but whomever it is, he or she will address your
5 discovery issues in the manner in which they do it.

6 MR. DELIKAT: Yeah, I think we know who it is, Jim.
7 It's the same magistrate we had in the last IBM case.

8 MR. ATKINS: Your Honor, it's Mr. Atkins. I believe
9 it's Magistrate Davidson.

10 THE COURT: Oh, Davidson. Terrific. Wonderful.
11 That's great. OK.

12 I would also encourage -- as my last point, the
13 parties here are very sophisticated, and the clients have
14 retained extremely competent counsel. You can resolve this
15 problem without having to appear before me and do a preliminary
16 injunction hearing by each being a little uncomfortable with
17 the resolution. I know you know that. Don't be afraid to
18 engage that discussion while you're addressing your discovery
19 issues. This is a solvable problem that counsel is able to
20 solve. I take it this is not your first rodeo together, and so
21 you know each other's points of view, and I'm sure in other
22 situations you've come to a proper resolution that neither of
23 you is completely satisfied with. So don't be afraid to do
24 that here.

25 MR. DELIKAT: Will do, your Honor.

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1 THE COURT: All right. I'm going to make this
2 returnable on the 14th, and I'm going to put an asterisk
3 subject to the Court moving it to the 20th for purposes of
4 courtroom availability. I'll get an order out today on your
5 going to see Magistrate Davidson.

6 Is there anything else I can do for the moment for
7 either of you?

8 MR. ATKINS: Your Honor, it's Mr. Atkins. I just had
9 a -- just wanted a clarification on the form of the order or
10 the text of the order. I'm looking at our proposed order. I
11 presume that you -- well, let me start with this: You
12 mentioned in your ruling that we had not addressed the issue of
13 nonsolicitation of contacting current IBM employees.

14 THE COURT: Right.

15 MR. ATKINS: OK. I just want to point out that is in
16 the proposed order.

17 THE COURT: I'm striking it.

18 MR. ATKINS: OK.

19 THE COURT: I'm striking it. I'm striking the
20 announcing. I'm going to work with your order. I'll do my
21 best to not make a mess of it, and I'm hopeful that we can get
22 our hearing going. If you do have discovery issues that are
23 going to get in the way and you both agree that it's not
24 possible to start on the 14th and you want to adjourn or move
25 these dates, one of you can write to me on consent and make

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1 proposals, and I'm happy to listen. OK?

2 MR. ATKINS: Your Honor.

3 THE COURT: Yes.

4 MR. ATKINS: At the risk of overstaying my welcome, I
5 wouldn't want the record to be unclear. Your Honor isn't
6 suggesting that Mr. Lima is permitted to contact IBM employees
7 given that the agreement prohibits him from doing so?

8 THE COURT: Let me be crystal clear -- and thank you
9 for that -- the agreement says what the agreement says. One of
10 the things I'm learning is that I need to adjudicate only what
11 the lawyers ask me to adjudicate and which is supported by
12 evidence. There is no evidence before me about Mr. Lima
13 contacting current employees to influence them to leave IBM.
14 That has nothing to do with whatever contractual obligations he
15 has. And you should never infer that I'm suggesting something.
16 I would rather just say it one way or the other. I'm not
17 inferring anything such at all.

18 MR. ATKINS: Thank you, your Honor.

19 THE COURT: OK.

20 MR. DELIKAT: Your Honor, Mr. Delikat. Just one
21 ministerial matter. Madam Court Reporter, how do we go about
22 contacting you if we want to get an expedited transcript?

23 (Discussion off the record)

24 MR. DELIKAT: Jim McQuade, anything further I might
25 have missed?

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1 MR. McQUADE: No, I think that covers it.

2 THE COURT: Thank you, counsel.

3 (Adjourned)

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